

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
American Mobile Radio Corporation)	File Nos. 72-SAT-AMEND-97
)	10/11-DSS-P-93
Application for Authority to Construct, Launch,)	26/27-DSS-LA-93
and Operate Two Satellites in the Satellite Digital)	83/84-SAT-AMEND-95
Audio Radio Service)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 2001

Released: November 30, 2001

By the Commission:

I. INTRODUCTION

1. By this Order, we deny the Application for Review filed by Primosphere Limited Partnership (“Primosphere”) and affirm a decision by the International Bureau (“Bureau”) giving American Mobile Radio Corporation (“AMRC”) Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service (“SDARS”).

II. BACKGROUND

2. On March 3, 1997, the Commission adopted rules to auction two 12.5 megahertz SDARS authorizations in the S band.² AMRC submitted one of two winning bids in the subsequent auction.³ After the auction but before license grant, AMRC amended its application, reporting that AMRC Holdings, Inc.

¹ See *American Mobile Radio Corporation, Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service*, Order and Authorization, 13 FCC Rcd 8829 (Int’l Bur. 1997) (“AMRC License Order”). AMRC subsequently changed its name to XM Radio, Inc. For purposes of this Order we will refer to the licensee as AMRC.

² The S band consists of the 2310-2360 MHz frequency band. See also *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, IB Docket No. 95-91, 12 FCC Rcd 5754 (1997) (“SDARS Order”).

³ AMRC License Order at 8830, n.7.

(“AMRC Holdings”) was then the direct owner of AMRC.⁴ At the time AMRC’s license was granted, AMRC’s ownership structure was described as follows: AMRC was one hundred percent owned by AMRC Holdings.⁵ AMRC Holdings’ principal stockholders were American Mobile Satellite Corporation (“AMSC”), a publicly-traded corporation, and WorldSpace, Inc. (“WorldSpace”). AMSC, the majority shareholder with eighty percent equity in AMRC Holdings, was affiliated with Hughes Telecommunications and Space Company and Delco Electronics Corporation. On March 14, 1997, AMRC established a strategic alliance with WorldSpace giving WorldSpace twenty percent of AMRC Holdings’ equity.⁶ On October 15, 1997, the Bureau authorized AMRC to launch and operate an SDARS system and denied Primosphere’s Petition to Deny AMRC’s application.⁷ Primosphere filed an Application for Review of the license grant.⁸

3. After license grant, on October 30, 1998, AMSC and WorldSpace applied to the Commission for consent to transfer control of AMRC Holdings from AMSC to WorldSpace. On June 8, 1999, AMSC announced that it would reacquire WorldSpace’s interest in AMRC Holdings and on July 7, 1999, AMRC’s transfer of control application was withdrawn. As a result of the reacquisition, WorldSpace did not retain any interest in the licensee.

4. The issues raised in the Application for Review are similar to those that Primosphere raised in its original Petition to Deny, and focus on two main arguments: (1) that the International Bureau (“Bureau”) erred by not analyzing who is the real-party-in-interest controlling AMRC Holdings; and, (2) that WorldSpace’s participation in AMRC Holdings is an attempt to circumvent the Commission’s satellite

⁴ See *In re Application of American Mobile Radio Corporation for a System Authorization in the 2.3 GHz Satellite Digital Audio Radio Service*, File No. 72-SAT-AMEND-97, filed May 16, 1997. (“AMRC Amendment”). AMRC also amended its technical specifications to conform to the SDARS service rules. 47 C.F.R. § 25.144.

⁵ AMRC Amendment at Exhibit VI.

⁶ On March 17, 2000 AMRC applied to the Commission for consent to *pro forma* transfer of control, from AMSC having *de jure* control of AMRC Holdings to AMSC having *de facto* control. This application was granted on March 30, 2000 but this *pro forma* transfer was never consummated. On July 14, 2000, AMRC filed another application to transfer control of AMRC from AMSC to the stockholders of AMRC Holdings. Primosphere filed an informal objection to this transfer on November 9, 2000, 70 days after the comment period closed. On December 21, 2000, the Commission granted this second transfer of control, subject to the outcome of Primosphere’s Application for Review under consideration here. We note that the first transfer was filed after AMRC changed its name to XM Satellite Radio Inc., and that the second transfer was filed after both the AMRC name change and AMSC’s name change to Motient Corporation. For the purposes of this Order we will continue to use the parties’ names as reflected in the *AMRC License Order*.

⁷ See *AMRC License Order*, 13 FCC Rcd at 8831.

⁸ Primosphere Application for Review, filed November 17, 1997. (“Primosphere Application”).

application processing round cut-off rules.⁹ AMRC filed an opposition to Primosphere's Application and Primosphere filed both a reply to AMRC's application and a supplement to that reply.¹⁰

II. DISCUSSION

A. Real-Party-In-Interest

5. Primosphere first argues that the Bureau erred by not analyzing the real-party-in-interest in AMRC's financial structure.¹¹ It asserts that although AMSC has *de jure* control of AMRC, the fact that AMSC states in its Securities and Exchange Commission ("SEC") filings that the development of SDARS will not have a significant impact on its financial position or cash flows, despite AMRC's alleged insolvency at the time of the license grant, demonstrates that another entity, probably WorldSpace, is supplying the working capital for AMRC's SDARS venture.¹² Primosphere contends that these facts raise a question regarding WorldSpace's control over the SDARS licensee.¹³ Primosphere, citing the *Intermountain Microwave* case,¹⁴ outlines a number of questions the Commission has used to determine whether an entity other than the applicant/licensee has *de facto* control.¹⁵ Primosphere asserts that under the *Intermountain Microwave* precedent, a relevant question in an examination of *de facto* control is who controls AMRC's financing.¹⁶

6. In response, AMRC asserts that the Bureau considered all of Primosphere's arguments and allegations and rejected them when it properly denied the petition to deny its application.¹⁷ AMRC further asserts that Primosphere has never met its burden of raising a *prima facie* real-party-in-interest question by alleging specific facts in satisfaction of the requirements for a petition to deny pursuant to Section 309(d),¹⁸ and that no substantial and material question of fact exists as to whether WorldSpace is the real party-in-

⁹ *Id.*

¹⁰ *Id.*; AMRC Opposition to Application for Review, filed December 2, 1997; Primosphere Reply to AMRC Opposition, filed December 17, 1997; Primosphere Supplement to Reply to AMRC Opposition, filed April 17, 1998 (filed without any request for waiver or extension of the deadline for replies to be filed pursuant to 47 C.F.R. § 1.115(f)).

¹¹ Primosphere Application at 3-4.

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Intermountain Microwave*, 24 Rad. Reg. 983,984 (1963).

¹⁵ *Id.* at 5.

¹⁶ Primosphere Application at 6.

¹⁷ AMRC Opposition at p. 5.

¹⁸ 47 U.S.C. § 309(d).

interest in AMRC.¹⁹ AMRC cites several cases in support of its arguments that Primosphere, not the Commission, has the burden to show the existence of a substantial and material question of fact.²⁰ AMRC also argues that WorldSpace's financial support of AMRC does not, by itself, demonstrate control of the applicant, nor, argues AMRC, do Primosphere's other allegations about officers and directors or stock prices indicate control by WorldSpace.²¹ Finally, AMRC states that because WorldSpace never had control of the applicant, there is no violation of the satellite application processing cut-off rule.²²

7. Primosphere replies by reiterating its contention that the Bureau erred in not examining the issue of control and cites broadcast cases where a formal inquiry into *de facto* control of the licensee was found to be warranted.²³ Primosphere also filed a supplement to its reply in which it proffers a press article that it says demonstrates that WorldSpace would shortly acquire a larger interest in AMRC and claims that this raises questions of *de facto* control.²⁴

8. We find that the Bureau correctly denied Primosphere's petition to deny AMRC's SDARS application. Parties challenging an application by means of a petition to deny must satisfy a two-step test established in 47 U.S.C. § 309(d)(1) & (2), as detailed in *Serafyn V. F.C.C.*²⁵ In the first step, the protesting party must submit a petition containing specific allegations of fact, supported by affidavits of persons with personal knowledge of the allegations, that are sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest.²⁶ The Commission must determine whether the petitioner meets this Section 309(d) threshold inquiry on the basis of the petitioner's allegations and affidavits alone, and must assume that the specific facts set forth in the petition are true.²⁷ Here the Commission is looking for solid factual assertions which, if proved, would affect the Commission's

¹⁹ AMRC Opposition at p. 6.

²⁰ AMRC Opposition at pp. 6-7. See, e.g., *Mobile Communications Corp. of America v. F.C.C.*, 77 F.3d 1399, 1410 (D.C. Cir. 1996); *Priscilla L. Schwier*, 4 FCC Rcd. 2659 (1989); *Bilingual Bicultural Coalition on Mass Media, Inc. v. F. C. C.*, 595 F.2d 621 (D.C. Cir. 1978).

²¹ AMRC Opposition at pp. 8-9. See, e.g., *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8515 (1995); *Roy M. Speer*, 11 FCC Rcd 14147, 14158 (1996).

²² AMRC Opposition at p. 9.

²³ Primosphere Reply at 3-4.

²⁴ Primosphere Supplement to Reply, filed April 17, 1998 at 2-3. Primosphere's supplement was filed after the deadline for filing replies but we will consider it as a late-filed comment. We also note that Primosphere filed an additional supplement on December 2, 1998 that reiterated its earlier arguments, now supported by an affidavit of a private investigator regarding his conversation with the receptionist at WorldSpace, Inc., along with a confidential Business Summary on AMRC Holdings, Inc. from Bear Stearns dated August, 1998, and other documents that appear to have been reassembled from torn pieces of paper.

²⁵ See 47 U.S.C. § 309(d)(1)-(2); see also *Serafyn V. F.C.C.*, 149 F.3d 1213, 1216 (D.C. Cir. 1998).

²⁶ *Id.*

²⁷ *Id.* See also *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir.1985).

determination that the grant of this application is in the public interest.²⁸ The Commission must then determine whether, if all the supporting facts alleged in the affidavits were true, a reasonable factfinder could conclude that the ultimate fact in dispute had been established.²⁹ If such a *prima facie* case has been established, we proceed to the second step of the test, wherein the allegations, taken together with any opposing evidence before the Commission, must still raise a substantial and material question of fact as to whether grant of the application would serve the public interest.³⁰

9. As to the real-party-in interest issue, Primosphere has failed to demonstrate a *prima facie* case. Primosphere's allegation that WorldSpace exercised *de facto* control of AMRC relied on the following publicly-available information to show that WorldSpace was in control of the AMRC license: (1) AMSC was operating at a loss and expected that operating revenues would be inadequate to cover operating expenses until sometime in 1998 or beyond;³¹ (2) AMRC arranged funding (all of which Primosphere alleges was supplied by WorldSpace) of the FCC license fees as well as initial working capital needs through the issuance of debt, not guaranteed by the company, and equity in AMRC;³² (3) AMRC stated that development of SDARS would not have a material impact on its financial position, results of operations or cash flows;³³ (4) AMSC's disclosed that if WorldSpace exercised its options, AMSC would be left with only a 28 percent ownership of AMRC;³⁴ and, (5) AMRC stated that the estimated cost of building and launching its SDARS system would be in excess of \$500 million.

10. First, we disagree with Primosphere's contention that the facts enumerated demonstrate a *prima facie* case that WorldSpace ever had *de facto* control of AMRC. These facts merely show that building and launching of an SDARS system would be a costly undertaking; that AMRC was at one point operating at a loss; that it obtained financing (allegedly supplied by WorldSpace) to continue building its system; and that WorldSpace's interests in AMRC, if WorldSpace's options were exercised, would make it the majority shareholder of AMRC. Under the Commission's rules, however, in the context of broadcast ownership, future ownership rights, such as options and convertible stock warrants, are not considered cognizable until exercised.³⁵ Furthermore, any exercise of these options that would give WorldSpace control of AMRC, would be subject to Commission approval under Section 25.119.³⁶ The mere fact that

²⁸ See *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C.Cir.1987).

²⁹ *Id.*

³⁰ *Serafyn V. F.C.C.*, 149 F.3d at 1216.

³¹ Primosphere Application at n. 1.

³² *Id.* at n. 2.

³³ *Id.* at n. 5.

³⁴ *Id.* at n. 4.

³⁵ 47 C.F.R. § 73.3555, n. 2(f). See also *Salt City Communications, Inc.*, 8 FCC Rcd 7584 (1993).

³⁶ 47 C.F.R. § 25.119(a), which states that "No station license, nor any rights thereunder, shall be transferred,

WorldSpace possessed these options, even considering AMRC's financial condition and its subsequent efforts to obtain additional financing, does not necessarily indicate ownership, *de jure* or *de facto*, of AMRC. AMRC disclosed WorldSpace's interests and the options that it held in AMRC, including the fact that WorldSpace's chief executive is one of three AMRC directors and that a second WorldSpace employee is one of five AMRC officers.³⁷ We have found in the past that an entity has *de facto* control if it has the ability to dominate the management of corporate affairs.³⁸ WorldSpace's representation in AMRC's corporate structure does not rise to the level of domination. Furthermore, on October 30, 1998, AMRC and WorldSpace filed an application for transfer of control of AMRC to WorldSpace.³⁹ On June 8, 1999, however, AMSC announced that it would purchase WorldSpace's interest in AMRC, and on July 7, 1999, AMRC and WorldSpace withdrew their transfer of control application. Therefore WorldSpace now has no interest in AMRC and has not been shown, with even a reasonable degree of persuasiveness,⁴⁰ to have had *de jure* or *de facto* control of AMRC at the time its license was granted. Thus, the facts that Primosphere offers in evidence to support its allegation, even when considered as a whole, do not rise to the level required by the court in *Serafyn v. F.C.C.* to make out a *prima facie* case that the grant of AMRC's application was inconsistent with the public interest.⁴¹

11. In addition, we reiterate that a showing of *de facto* control must rely on facts and events that have occurred and not speculation as to what might occur in the future.⁴² Primosphere relied on press articles that speculated on WorldSpace's control of AMRC in its Petition to Deny and its Application for Review.⁴³ As the Bureau noted in the AMRC license Order regarding an article proffered by Primosphere in its petition to deny, "the Commission has consistently held that newspaper and magazine articles are the equivalent of hearsay and do not meet the specificity and personal knowledge requirements in a petition to deny."⁴⁴

12. We find that Primosphere's arguments and allegations merely reiterate the unsupported allegations and conclusory statements made in its petition to deny AMRC's application. Because

assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation or any other entity holding such license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby."

³⁷ AMRC Opposition at 8.

³⁸ *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8515, ¶ 158 (1995)

³⁹ FCC File No. SAT-T/C-19981030-00081.

⁴⁰ *Serafyn V. F.C.C.*, 149 F.3d at 1220.

⁴¹ *Id.*

⁴² *Fox Television Stations, Inc.*, 10 FCC Rcd at 8516-17, ¶ 160 (1995), quoting *William S. Paley*, 1 FCC Rcd 1025, 1025-26 (1986), *aff'd mem.* 851 F.2d 1500 (table) (D.C. Cir. 1988).

⁴³ See Primosphere Supplement to Reply to Opposition at Exhibit 1.

⁴⁴ See, e.g., *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 502 (D.C. Cir. 1988).

Primosphere has not met its burden under Section 309(d) to show that grant of AMRC's application was *prima facie* inconsistent with the public interest, we conclude that the Bureau was correct in denying Primosphere's petition.

B. Circumvention of Cut-Off Rule

13. Primosphere also argues that because WorldSpace exercised *de facto* transfer of control of AMRC, it was circumventing the Commission's rules that treat applications where the applicants file major amendments (e.g., transfers of control) to their applications after the satellite processing cut-off date as newly filed.⁴⁵ Primosphere urges the Commission to rescind AMRC's authorization and reauction or dispose, by comparative hearing, of the SDARS authorization. Primosphere cites the *Rebecca Radio of Marco* case to support its contention that, "in broadcast proceedings, the Commission will not grant an application to a party who is not the applicant by the 'cut-off' date, even as part of a 'white knight' settlement of a comparative proceeding."⁴⁶ *Rebecca Radio of Marco* held that, regarding settlements in broadcast comparative hearings, a third party who was not an original applicant for a broadcast station may be substituted for the licensee if good cause exists.⁴⁷ This case is not dispositive of the issues here. Because we find that Primosphere has provided no factual basis for its contention that WorldSpace was in fact in control of AMRC, we find that the Bureau was correct in determining that AMRC did not circumvent our filing rules.⁴⁸

III. CONCLUSION

14. Primosphere has failed to demonstrate that the Bureau erred in denying its petition against AMRC's SDARS application. Therefore, we affirm the Bureau's Order of October 16, 1997 granting AMRC's authorization.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, Primosphere Limited Partnership's November 17, 1997 Application for Review of the International Bureau's Order of October 16, 1997 that granted American Mobile Radio Corporation's authorization to operate two satellites in the Satellite Digital Radio Service, *Order and Authorization*, DA 97-2210, 13 FCC Rcd 8829 (Int'l Bur. 1997), IS DENIED.

⁴⁵ Primosphere Application at pp. 8-9.

⁴⁶ Primosphere Application at p. 9.

⁴⁷ See *Rebecca Radio of Marco*, 4 FCC Rcd. 830, 834, ¶¶ 34-39 (1989).

⁴⁸ 47 C.F.R. § 25.116(c)(2).

16. IT IS FURTHER ORDERED that this Order will be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary